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In The

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, ET AL.,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

ALTADIS U.S.A., INC., ET AL.,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICUS CURIAE ASSOCIATION OF NATIONAL ADVERTISERS, INC. IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The Association of National Advertisers, Inc. ("ANA"), the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. ANA's members rely on advertising to market a kaleidoscopic array of goods and services. As the nation's principal community of commercial speakers, ANA has long been committed to First Amendment protection of truthful commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

ANA has appeared routinely as an amicus curiae in commercial speech cases before this Court. In *Greater New Orleans Broadcasting Association, Inc. v. United States*, 527 U.S. 173, 184 n.3 (1999), this Court cited ANA's brief for its articulation of the position that truthful, nonmisleading commercial speech should be protected by a strict scrutiny standard, instead of the current *Central Hudson*[2] test.

This appeal is of particular importance to ANA and its members. Under the First Circuit's reasoning, the judiciary would exercise virtually no check on a government

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The written consent of the parties to the filing of this brief has been filed with the Clerk of Court.

[2] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

that seeks to impose content-based restrictions on truthful advertising for the asserted purpose of protecting children. Such unquestioning deference to a governmental censor jeopardizes the commercial speech rights of all advertisers and their audiences.[3]

SUMMARY OF ARGUMENT

The decision of the court of appeals threatens to eliminate the constitutional guarantee of free speech with respect to a broad range of protected messages. This Court has stated repeatedly that content-based restrictions on speech are presumptively invalid. The list of exceptions to that rule has been deliberately kept short and narrowly defined. In the First Circuit's dangerous view, however, that list should be expanded to include any speech restriction that a government claims was adopted to protect children.

Creation of a "child protection" exception to the First Amendment has been rejected by numerous decisions of this Court. While efforts to childproof the flow of speech in our society might be politically popular, such restrictions would impose a constitutionally intolerable burden on adult-to-adult communications and would intrude on

[3] Although ANA does not address the federal preemption claim in this case, it agrees with petitioners that the Massachusetts regulations are preempted under the Federal Cigarette Labeling and Advertising Act, as made plain by the Ninth Circuit's analysis of a similar issue in *Lindsey v. Tacoma-Pierce County Health Dep't*, 203 F.3d 1150 (9th Cir. 2000).

the rights of parents to control the education of their children.

If government did have more leeway to restrict speech when it claimed to be protecting children, the range of public discussion in our nation could be severely compromised. Politicians could characterize a wide range of speech as harmful to minors. The forbidden topics would relate not only to child-sensitive products and services, but also to art and entertainment. In order to preserve the full range of speech, "child protection" must not become magic words that make First Amendment rights disappear.

The instant case illustrates the danger of adopting a "child protection" exception to the First Amendment. The First Circuit, believing that such an exception exists, greatly diluted its review of the record in this case. Rather than presume that the Massachusetts regulations are invalid – as required by the First Amendment – the court apparently thought that the regulations should be upheld as long as the government had a superficially reasonable basis for their adoption. In reversing the First Circuit's decision, this Court again should reject the notion that there exists a "child protection" exception to the First Amendment.

ARGUMENT

I. CONTENT-BASED RESTRICTIONS ON SPEECH ARE PRESUMPTIVELY INVALID UNLESS THE RESTRICTED SPEECH FALLS WITHIN CERTAIN NARROW EXCEPTIONS

Just last term, the Court reiterated one of the fundamental principles of its First Amendment jurisprudence: "It is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878, 1889 (2000). Put another way, "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

The First Amendment serves a fundamental national interest by treating content-based restrictions on speech as anathema:

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal. Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.

Turner Broad. Sys., Inc. v. F.C.C., 512 U.S. 622, 641 (1994).

For these reasons, the First Amendment does not countenance governmental control over the content of messages expressed by private individuals, "subject only to narrow and well-understood" exceptions. *Id.* at 641. This Court seeks to ensure that the line is "finely drawn" between speech that falls within those exceptions and speech that is "unconditionally guaranteed." *Speiser v. Randall*, 357 U.S. 513, 525 (1958). The short list of exceptions to full First Amendment protection includes obscenity, defamation, "fighting words," and commercial speech that either is false or misleading, or promotes a product or service that is unlawful for all consumers. *See infra* at 6.

During the past decade, this Court has sharpened the line between protected and unprotected commercial speech. The philosophical underpinning for this line-drawing is expressed best in *R.A.V.*, which happens to be a noncommercial speech case. There, the Court held that government may not restrict the content of speech for reasons other than those that make a particular category of speech proscribable, rather than fully protected. *Id.* at 387-88. The Court invalidated the speech restrictions in *R.A.V.* because defendant City of St. Paul had restricted "fighting words" not because of the likelihood of a violent response, but in order to impose special prohibitions on "those speakers who express[ed] views on disfavored subjects." *Id.* at 391. More to the point, the Court added that this same First Amendment principle would mean that government cannot restrict the content of commercial speech for reasons other than those that could justify depriving it of full First Amendment protection, such as the risk of fraud. *See id.* at 388-89 (citations omitted).

One year after *R.A.V.*, this Court restated the principle that only a narrow sub-category of commercial speech is excluded from the general body of speech that presumptively is guaranteed by the First Amendment. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993), the Court explained that commercial speech may be subjected to greater governmental regulation than noncommercial speech only when government asserts an interest in preventing "commercial harms."

R.A.V. again was invoked in spirit if not in name when Justice Stevens, writing in *44 Liquormart* and joined by Justices Kennedy and Ginsburg, endorsed application of strict scrutiny to content-based restrictions on commercial speech: "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process [*i.e.*, prevention of overreaching or deception], there is far less reason to depart from the rigorous review that the First Amendment generally demands." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996).

Moreover, there are numerous reasons why the courts should adhere in the context of content-based restrictions on commercial speech to the "rigorous review that the First Amendment generally demands." *See id.* As this Court has observed, a "particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-82 (1995) (citations omitted). Content

discrimination not only hinders discussion about the relative merits of various products and services, but also whether and to what extent the underlying economic activities should be regulated. *See 44 Liquormart*, 517 U.S. at 503 (principal opinion). For example, the nation currently is engaged in a very visible debate concerning tobacco products. Particularly at this time, Massachusetts should not be able to enforce its regulations, which restrict the flow of commercial messages that otherwise would both stimulate and inform this important national debate. *See id.* Further, as members of this Court have recognized, the historical evidence of original intent supports full First Amendment protection for commercial speech. *See id.* at 517 (Scalia, J., concurring); *id.* at 522 (Thomas, J., concurring).

When these principles are applied to the Massachusetts regulations, it is clear that the regulations do not fall within an exception to the First Amendment's prohibition of content-based restrictions on speech. As a threshold matter, the Massachusetts regulations undoubtedly are content-based – they apply only to advertisements that seek to promote the sale of tobacco products. *See Reno v. A.C.L.U.*, 521 U.S. 844, 867-68 (1997). In fact, the First Circuit itself recognized that the regulations are content-based and focused on the messages and images conveyed by tobacco advertising. *See* App. 14a, 29a.

The Attorney General's content-based regulations do not fall within the exception to the First Amendment for commercial speech that is false or misleading, or that promotes a product or service that is unlawful for all consumers. Massachusetts does not dispute that the

advertisements it seeks to restrict are truthful and non-misleading. Nor does the government claim that tobacco use is unlawful; indeed, even minors may possess and use tobacco in Massachusetts.[4] *See* App. 32a.

Thus, the First Circuit should not have treated the Massachusetts regulations as if they fell within any of the established exceptions to the general rule against content-based restrictions on speech. More to the point, the court of appeals should not have attempted to create a new exception to the First Amendment. Nonetheless, the First Circuit did just that, suggesting that government has greater leeway to restrict speech directed to adults when it believes the speech is harmful to children. As discussed below, this Court repeatedly has rejected attempts by government to create such a new exception to the First Amendment.

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[4] Although the sale of tobacco products to minors is illegal in Massachusetts, the regulations restrict all advertising for tobacco products, regardless of whether that advertising is intentionally targeted to minors. In any event, the fact that minors may not lawfully purchase tobacco products cannot justify a restriction on communications between tobacco advertisers and adults.

II. THERE IS NO EXCEPTION FROM GENERAL FIRST AMENDMENT PRINCIPLES FOR SPEECH RESTRICTIONS ADOPTED IN THE NAME OF PROTECTING CHILDREN

A. This Court Repeatedly Has Held that a Legislature's Asserted Interest in Protecting Children Cannot Trump First Amendment Rights

This is not the first case, nor likely will it be the last, where government claims that it must restrict speech directed to adults in order to protect children. Similarly, the Attorney General is not unique among would-be censors in urging this Court that "government has more latitude to regulate even noncommercial speech where its purpose is to protect children from particular risks associated with it." Respondent's Brief in Opposition at 20. But this Court consistently has rejected such arguments for a "child protection" exception to the First Amendment's presumptive guarantee of free speech. *See Reno*, 521 U.S. 844; *Sable Communications of Calif., Inc. v. F.C.C.*, 492 U.S. 115 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Butler v. Michigan*, 352 U.S. 380 (1957); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

In *Joseph Burstyn*, the Court overturned a ban on a specific film, notwithstanding the government's argument that "motion pictures possess a greater capacity for evil, particularly among the youth of a community, than other modes of expression." *Id.* at 502. The Court stated that, even if there were capacity for such evil, it would not authorize "substantially unbridled censorship." *Id.*

In *Butler*, the Court invalidated Michigan's prohibition on the sale of materials "tending to incite minors to

violent or depraved or immoral acts, [or] manifestly tending to the corruption of the morals of youth . . . . " 352 U.S. at 381. The Court held that the challenged law impermissibly "reduce[d] the adult population of Michigan to reading only what is fit for children." *Id.* at 383. It added, "[s]urely, this is to burn the house to roast the pig." *Id.*

In *Bolger*, the Court relied on *Butler* to strike down as unconstitutional a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. 463 U.S. at 73-74. Noting that the unsolicited advertisements were "entirely suitable for adults," the Court invalidated the statute as an impermissible restriction on commercial speech. *Id.*

This principle again was applied to a restriction on indecent speech in *Sable*. At issue was a federal ban on, *inter alia*, indecent commercial telephone messages, commonly known as "dial-a-porn." In reliance on *Butler* and *Bolger*, the Court struck down the ban because it "ha[d] the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear." 492 U.S. at 131.

More recently in *Reno*, the Court held unconstitutional provisions of the Communications Decency Act of 1996 that sought to protect minors from indecent material on the Internet, but that also interfered with the ability of adults to communicate with one another. The Court again explained that government's assertion of a "child protection" interest does not reduce its burden to justify restrictions on adult-to-adult communications. As the Court stated, "[i]t is true that we have repeatedly recognized

the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno*, 521 U.S. at 875. *See also Playboy Entertainment Group*, 120 S. Ct. 1878 (invalidating federal law which required cable television operators providing indecent programming to restrict their transmission so as to shield children from "signal bleed").

Apart from the First Amendment, there is another reason why government does not have license to restrict speech in the name of protecting children: the Constitution entrusts parents, not government, with the primary responsibility of supervising the exposure of children to various types of speech. As recently held in *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 2060 (2000), "[i]n light of [this Court's] extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."

This Court's consistent recognition of the preeminent role of parents militates against the constitutionality of laws that take child-rearing decisions out of the hands of parents and place them into the hands of a censoring government. Parents should have the unfettered right to expose and educate their children with respect to all variety of speech (as long as that speech does not fall within one of the exceptions to the First Amendment), regardless of whether some people might find certain messages offensive. *See Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1031 (9th Cir. 1998) (stating that a "necessary component of any education is learning to

think critically about offensive ideas – without that ability one can do little to respond to them").[5]

Thus, for three independent reasons – the rights of speakers to communicate messages to adults, the rights of adults to receive those messages, and the rights of parents to control the development and education of their children – there is not, and should not be, a "child protection" exception to the First Amendment.

B. The First Circuit Erred in Holding that Government Has Greater Leeway to Restrict Speech Where Children Are Concerned

The court of appeals did not heed this Court's repeated rejection of attempts to create a new exception to the First Amendment whenever government claims that its goal is to protect children. Instead, the First Circuit incorrectly stated that, "the courts have consistently recognized that the government may act more protectively where children are concerned." App. 18a. As purported support for its view of First Amendment law, the First Circuit cited two decisions, *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), and *Anheuser-Busch, Inc.*

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[5] Massachusetts cannot argue that government has greater power to restrict outdoor advertising than other media because exposure to such advertising is allegedly more difficult for parents to control. Similar arguments could be (and have been) made about virtually every medium. Such arguments cannot be accepted without risking that the resulting exceptions to full First Amendment protection would swallow the rule. *See Joseph Burstyn*, 343 U.S. at 503. Indeed, this Court invalidated the restrictions on indecent television programming in *Playboy Entertainment Group*, even though such speech could "come[ ] into the home without parental consent." 120 S. Ct. at 1886.

v. Schmoke, 101 F.3d 325 (4th Cir. 1996). Neither of those cases supports the First Circuit's deferential approach to censorship.

The First Circuit failed to note that the result in *Erznoznik* actually contradicts the existence of a "child protection" exception. The *Erznoznik* Court found a governmental interest in "child protection" insufficient to support a city ordinance prohibiting the showing of films containing nudity by drive-in theaters whose screens are visible from a public street. 422 U.S. at 212-13. Moreover, the Court struck down the ordinance because of its impact on the First Amendment rights of minors themselves. *See id.* Contrary to the First Circuit's view, the *Erznoznik* Court did not hold that government's burden to justify interference with adult-to-adult communications is reduced by an asserted interest in child protection.

Unlike *Erznoznik*, the Fourth Circuit's decision in *Anheuser-Busch* at least supports the First Circuit's view that child-sensitive speech should receive reduced First Amendment protection. The Fourth Circuit attributed to this Court a "repeated recognition that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media." 101 F.3d at 329. But the Fourth Circuit's interpretation of this Court's decisions was in error at the time that it was issued and is even more clearly in error today. *See Playboy Entertainment Group*, 120 S. Ct. at 1886-87 (reiterating that a governmental objective of shielding children does not suffice to support restrictions on adult-to-adult communications).

The Fourth Circuit mistakenly pointed to five decisions of this Court to support its "special solicitude" argument.[6] Each of the five decisions may be considered in turn. In *Ginsberg*, the Court upheld a ban on the sale of magazines that were obscene as to minors. *Ginsberg* does not support the proposition that speech directed to adults may be restricted when government seeks to protect children. Unlike the instant case, the ban affected minors only, and had no impact on adults, who were free to buy the magazines in question.

Osborne and *Ferber* may be considered together, as they are both child pornography cases. In both cases, this Court upheld statutes that banned the distribution of child pornography in order to protect children from the underlying criminal act required to produce such material. The Massachusetts regulations, in contrast, restrict tobacco advertising even though there is no criminal act involved in the production of tobacco products. Unlike the speech at issue in the child pornography cases, tobacco advertising cannot be characterized as arising from a criminal act. Indeed, *Osborne* and *Ferber* are entirely consistent with the rule that truthful, non-misleading advertising loses its full First Amendment protection if it promotes a product or service that is unlawful for all consumers.

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[6] *See Denver Area Educ. Telecomm. Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996); *Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982); *F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978); *Ginsberg v. New York*, 390 U.S. 629 (1968).

As for *Pacifica*, this Court repeatedly has stated that it is an "emphatically narrow holding," so the Fourth Circuit erred by attempting to derive a broad exception to the First Amendment from it. *See Reno*, 521 U.S. at 870 (citation omitted). Moreover, *Pacifica* is inapplicable here for many of the same reasons that it was held inapplicable in *Reno*. *See id.* at 867. Unlike the FCC order in *Pacifica*, which "targeted a specific broadcast that represented a rather dramatic departure from traditional program content," the Massachusetts regulations apply to all tobacco advertising in the restricted zone. *Id.* Further, *Pacifica* is distinguishable because it involved television, "which as a matter of history had 'received the most limited First Amendment protection.' "[7] *Id.* Apart from the reasons identified in *Reno*, *Pacifica* also is inapplicable here because it involved indecent speech, not advertising. Whereas government typically argues that indecent speech harms children immediately upon their exposure to it, no such argument can be made as to non-indecent commercial speech.

Denver Area actually contradicts the "special solicitude" argument. In the only section of the principal opinion that was joined by a majority of the Justices, the Court

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[7] The *Pacifica* Court relied on a "scarcity" rationale to justify greater regulation of broadcast television, but scarcity of the broadcast spectrum is far less significant today in light of the proliferation of new media, including cable television. Consequently, *Pacifica* may no longer be good law. *See Turner Broad. Sys.*, 512 U.S. at 638 (noting that the continuing validity of *Pacifica* has been called into question by courts and commentators).

invalidated the federal law requiring cable system operators to segregate and block sex-related programming. 518 U.S. at 753-60. In rejecting the government's argument that the restriction was necessary to protect children, the Court reiterated that the First Amendment does not permit reducing the adult population to viewing only what is fit for children. *See id.* at 759; *id.* at 807 (Kennedy & Ginsburg, J.J., concurring in part and dissenting in part) (same).

As demonstrated above, there is no support in this Court's cases for the Fourth Circuit's position, adopted by the First Circuit here, that children receive "special solicitude" in the First Amendment balance. Not surprisingly, First Amendment commentators have bluntly condemned the Fourth Circuit's overly deferential review of speech restrictions adopted in the name of protecting children.[8]

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[8] *See* 2 Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 20:24 (1997 ed.) ("The panel's decision in *Anheuser-Busch II* simply cannot be squared with the jurisprudence of *44 Liquormart*."); Sean P. Costello, *Strange Brew: The State of Commercial Speech Jurisprudence Before and After 44 Liquormart, Inc. v. Rhode Island*, 47 Case W. Res. L. Rev. 681, 729 (1997) (criticizing the Fourth Circuit for showing "a remarkable willingness to accept weak and even nonexistent evidence in support of commercial speech regulations."); William D. O'Neill, *Governmental Restrictions on Beverage Alcohol Advertising After 44 Liquormart v. Rhode Island*, 42 St. Louis U. L.J. 267, 296 (1998); Andrew S. Gollin, *Improving the Odds of the Central Hudson Balancing Test: Restricting Commercial Speech as a Last Resort*, 81 Marq. L. Rev. 873, 903 (1998); Thomas D. Blue, Jr., *Over the Edge: The Fourth Circuit's Commercial Speech Analysis in Penn Advertising and Anheuser-Busch*, 74 N.C. L. Rev. 2086, 2089 (1996).

In short, the First Circuit erred in concluding that First Amendment scrutiny of Massachusetts' content-based restrictions on speech should be reduced because the government asserted an interest in protecting children. As discussed below, if such a "child protection" exception to the First Amendment were created, an enormous amount of fully protected speech would be placed in jeopardy.

III. THE FIRST CIRCUIT'S ATTEMPT TO CREATE A "CHILD PROTECTION" EXCEPTION TO THE FIRST AMENDMENT ENDANGERS A WIDE RANGE OF SPEECH

Today, would-be regulators of speech routinely attempt to dress up censorship in the cloak of protection of children. In contemporary society, however, where adults and minors often are exposed to the same media, it is difficult to keep communications away from children without simultaneously restricting the rights of adults to communicate with one another. If a "child protection" exception to the First Amendment were to become the law – as the First Circuit's opinion contemplates – governments quickly would seize upon that exception to justify all manner of restrictions on adult-to-adult communications.

This case illustrates how a "child protection" exception to the First Amendment would provide government with a simple recipe for creating speech restrictions that would withstand constitutional scrutiny. First, government would select the disfavored or unpopular speech that it would like to restrict. Next, government would assert that such speech must be restricted in order to

protect children. In the vast majority of cases, government could make this assertion with a straight face, as children often are perceived as a vulnerable audience, and government would argue that they more likely would be harmed by the "offensive" speech. Then, government would claim that children frequent the entire geographic area of the relevant jurisdiction and, consequently, that the "offensive" speech must be largely eliminated from the landscape. Based on these factors, government would adopt far-reaching restrictions on speech that, while ostensibly adopted for the sole purpose of protecting minors, in fact would decimate the ability of adults to communicate with one another. If such a speech restriction were challenged in court, government would insist that its "child protection" purpose allows it to bypass the First Amendment.

That is precisely what happened in Massachusetts. Nobody would dispute that tobacco is one of the most controversial products in our nation. Not surprisingly, elected politicians in Massachusetts targeted speech about tobacco for censorship. They claimed that minors are particularly vulnerable to tobacco advertising and that their daily activities take them throughout the towns and cities where they live. The result: adults are now restricted from communicating with one another concerning a lawful product in up to 90 percent of the geographic area in Massachusetts' three largest cities.[9] *See* App. 30a.

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[9] The Attorney General cannot save his regulations by arguing that tobacco advertisers have other, unrestricted means to communicate with adults. This Court has rejected the argument that a content-based restriction on speech should

This recipe for censorship could be followed by government to justify restrictions on a wide range of speech. If the First Circuit's decision were affirmed, existing case law that invalidated "child protection" speech restrictions would be called into question. Further, speech restrictions that are currently on the books, but that are of dubious constitutional validity, suddenly would become impervious to attack.

The list of products and services that could be deemed harmful to children is limited only by the imagination of politicians. For example, the First Circuit's reasoning would permit the restriction of automobile advertising by governments that claimed to be fighting illegal underage driving. Adoption of a "child protection" exception would encourage governments to disregard existing case law that invalidated restrictions on advertising for contraceptives.[10] Other obvious targets include the numerous products and services that children are

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receive less First Amendment scrutiny when it affects only one mode of communication. *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977).

[10] *See Bolger*, 463 U.S. 60 (striking down a federal statute prohibiting mailing of unsolicited advertisements for contraceptives, over arguments that such speech was inappropriate for children); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977) (holding that a State could not prohibit contraceptive advertisements for asserted purpose of protecting minors); *AIDS Action Comm. of Mass., Inc. v. Massachusetts Bay Transp. Auth.*, 849 F. Supp. 79 (D. Mass. 1994), *aff'd*, 42 F.3d 1 (1st Cir. 1994) (holding that government may not reject advertisements, which used witty sexual innuendoes in promoting use of condoms to prevent spread of AIDS, in order to protect minors).

restricted from buying or using. Minors typically may not purchase alcohol, gamble, or play the lottery. Children also may not buy fireworks, explosives, guns, poison, pesticides, toxic substances, spray paint, securities, prescription medication, or tickets for public transportation. Similarly, children are discouraged, and often prevented by law, from using escort services, entering bars or billiard rooms, renting hotel or motel rooms, using fee-based telephone services, making financial investments, or obtaining credit cards or insurance. The mere fact that certain products and services are off-limits for children cannot mean that government may prohibit adults from communicating with one another about those products and services.

Importantly, the risks posed by a "child protection" exception are not limited to commercial speech, but include noncommercial speech as well, because of the broad language used by the First Circuit and the Fourth Circuit in their declarations of a "child protection" exception. *See* App. 18a-19a; *Anheuser-Busch*, 101 F.3d at 329. The motion picture and video industries could lose their ability to market,[11]

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[11] *See Motion Picture Ass'n of America v. Specter*, 315 F. Supp. 824, 826 (E.D. Pa. 1970) (striking down statute criminalizing presentation of preview rated not suitable for children); *see also* Fla. Stat. Ann. § 501.138 (West 2000) ("Any motion picture theatre owner or operator who desires to exhibit, on the same program, a motion picture which has received a 'G' rating and which he or she advertises as 'G' rated, and a preview or trailer of a motion picture which has not received a 'G' rating, shall in all such advertising of the program give notice to the public of the exhibition of the preview or trailer"); Ky. Rev. Stat. Ann. § 231.180 (West 2001) ("No movie theatre, drive-in theatre, or other facility requiring a fee for admission shall show an 'X' or

rent[12] or exhibit[13] adult-rated or violent movies. Similar restrictions could affect the content of televised political commercials,[14] sporting events[15] and

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'R' rated movie in their previews if a 'G' or 'GP' movie is playing"); R.I. Gen. Laws § 42-43-9 (West 1999) (same); Va. Code Ann. § 18.2-386 (West 2000) (same).

[12] *See U.S. Sound & Service, Inc. v. Township of Brick*, 126 F.3d 555, 557-59 (3d Cir. 1997) (holding unconstitutional regulations prohibiting video store operator from using preview booths where sole basis for board's restrictions was "a desire to protect minors from exposure to adult entertainment"); Md. Com. Law § 14-1602 (West 2000) ("A person may not sell at retail or rent, or attempt to sell at retail or rent, a video movie in this state unless the official rating of the motion picture from which it is copied is clearly displayed on the outside of any cassette, case, jacket, or other covering of the video movie.").

[13] *See Erznoznik*, 422 U.S. 205 (holding ordinance aimed at prohibiting youths from viewing films containing nudity was broader than permissible); *see also* Del. Code Ann. § 1366 (West 1999) (forbidding owners and operators of outdoor motion picture theatres from exhibiting films "not suitable for minors" where film can be viewed by such minors not in attendance at the said outdoor movie theatre; and defining "not suitable for minors" as "any film, reel or view which has a rating of 'R' or 'X' "); R.I. Gen. Laws § 42-43-10 (West 1999) (same); S.C. Code § 52-3-110 (West 2000) (same); Tenn. Code Ann. § 39-17-907 (West 1999) (same).

[14] *See Becker v. F.C.C.*, 95 F.3d 75, 320 U.S.App.D.C. 387 (1996) (finding impermissible an FCC order permitting broadcast licensee to restrict broadcast of campaign advertisements portraying images of aborted fetuses to times of the day when children were less likely to be in viewing audience).

[15] *See* Robert Corn-Revere, *TV Violence*, Congressional Testimony by Federal Document Clearing House, May 18, 1999, *available in* 1999 WL 16948007 (discussing the "socially-sanctioned violence of professional sports" as conceivably "a source of the most widespread social effects of all"); *FCC*,

regular programming.[16]

Similarly, if government were permitted to childproof the flow of communications in our society, there would be a stifling of the incentive to create, advertise, or sell music that might not be suitable for children. At risk of censorship would be music containing violent[17] or erotic[18] lyrics that arguably might be harmful to minors.

As illustrated by the above examples, this case is not simply about tobacco. Nor will the impact of this Court's

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Warren's Cable Regulation Monitor, Oct. 25, 1999, *available in* 1999 WL 6826245 (discussing FCC Commissioner's vow to restrict media violence and his attack on pro-wrestling as "a particular example of media violence" and claiming that children do not understand wrestling violence is staged).

[16] *See Olivia N. v. Nat'l Broad. Co., Inc.*, 126 Cal. App. 3d 488, 178 Cal.Rptr. 888 (1981) (refusing to impose liability on broadcasting companies for injuries inflicted by certain juveniles allegedly acting upon stimulus of observing "artificial rape" scene on television drama).

[17] *See Torries v. Hebert*, 111 F. Supp. 2d 806 (W.D. La. 2000) (holding that First Amendment rights were violated by prosecution of skating rink proprietor for contributing to delinquency of minors by playing of "gangster rap" at skating events); *Waller v. Osbourne*, 763 F. Supp. 1144 (1991), *aff'd*, 958 F.2d 1084 (11th Cir. 1992), *cert. denied*, 506 U.S. 916 (1992) (holding First Amendment rights of creators of song which allegedly induced teenage boy to commit suicide protected creators from being held liable for the boy's death); Jerry Flattum, *Gangsta Rappers Have Gone Too Far*, U-Wire (Minn.), Jan. 22, 1999, *available in* 1999 WL 5935427 (discussing Senate Committee's probe into impact of violent rap lyrics on children).

[18] *See Soundgarden v. Eikenberry*, 123 Wash. 2d 750, 871 P.2d 1050 (1994) (finding erotic sound recordings statute unconstitutional).

decision necessarily be limited to advertising. Rather, this Court should reject explicitly the First Circuit's "child protection" exception to the First Amendment in order to preserve the free flow of a wide range of speech.

IV. THE DECISION BELOW SHOULD BE REVERSED UNDER EITHER STRICT SCRUTINY OR THE *CENTRAL HUDSON* TEST

The First Circuit's deference to governmental censorship exemplifies the type of judicial approach that Professor Catherine J. Ross warned against in her article, *Anything Goes: Examining the State's Interest in Protecting Children from Controversial Speech*, 53 Vand. L. Rev. 427, 466 (2000):

> Where protection of children is invoked as an interest, cogent legal analysis too often is deemed gratuitous. Many factors contribute to this analytic looseness. These factors include an emotional response to children's vulnerability, an irrational sense that if a law is designed to protect children, then it must be good, and the often unquestioned legal principle that while children may have rights, the rights accorded to them are not co-extensive with the rights of adults.

The First Circuit mistakenly believed that the Attorney General's assertion of a "child protection" purpose somehow reduced his constitutional burden of proof. That belief diluted and tainted the court's review of the record in this case. When proper constitutional scrutiny is applied, it is clear that the Attorney General failed to

satisfy his burden under either strict scrutiny or the corresponding requirements of the *Central Hudson* test.[19]

This Court recently has emphasized the importance of holding government to its burden of proof in First Amendment cases. In *Playboy Entertainment Group*, the Court explained, "[i]ndeed, were we to give the Government the benefit of the doubt when it attempted to restrict speech, we would risk leaving regulations in place that sought to shape our unique personalities or to silence dissenting ideas." 120 S. Ct. at 1889. Moreover, the Court stated that, when the evidence submitted on opposing sides on a First Amendment issue amounts to a "draw," the "tie goes to free expression." *Id.* Instead of holding the Attorney General to this standard of proof, the First Circuit mistakenly required him to show only that he had a "reasonable" basis for his speech restrictions.[20]

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[19] Although ANA would welcome this Court's explicit adoption of a strict scrutiny standard, reversal of the First Circuit's decision may be accomplished on the alternative ground that the decision cannot be squared with the *Central Hudson* test. In any event, this Court's recent decisions have made the government's heavy burden under the two tests almost indistinguishable, at least when the regulated advertising is truthful and nonmisleading, and relates to a lawful product or service. *See 44 Liquormart*, 517 U.S. at 501.

[20] For example, the First Circuit failed to require the government to prove the effectiveness of its ban on point-of-sale advertising placed lower than five feet from the floor. Remarkably, the court itself acknowledged its "misgivings about the effectiveness of a restriction that is based on the assumption that minors under five feet tall will not, or will less frequently, raise their view above eye-level," but nonetheless held that "such determination falls within the range of

The Attorney General failed to satisfy his constitutional burden of proof in two important respects. First, the Attorney General failed to demonstrate the effectiveness of his speech ban in achieving its asserted goal. This requirement appears both under the strict scrutiny test and the third prong of *Central Hudson*. *See Edenfield v. Fane*, 507 U.S. 761, 771 (1993); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 638-39 (1980). More specifically, the First Circuit should have required the Attorney General to prove that his restrictions on tobacco advertising would cause a direct and *material* reduction in underage smoking. *See id.*

The court of appeals acknowledged that the government and plaintiffs had submitted conflicting evidence as to whether tobacco advertising in fact causes tobacco use. *See* App. 25a. However, the court held that "the fact that there may exist differences of opinion on this issue is insufficient to deprive Massachusetts of its ability to enact regulations based on a well-founded conclusion that advertising restrictions will reduce tobacco use among young people." App. 27a. The First Circuit erred by refusing to test the evidence submitted by the parties,

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reasonableness in which the Attorney General is best suited to pass judgment." The First Circuit's "reasonableness" approach to reviewing speech restrictions has been rejected by this Court. *See 44 Liquormart*, 517 U.S. at 508 (principal opinion) (rejecting Rhode Island's argument, accepted by First Circuit, that it only needed to show that its price advertising ban was a "reasonable choice"); *id.* at 531 (O'Connor, J., concurring) (stating that the courts may not accept legislative assertions as "reasonable, without further inquiry").

let alone determine whether the evidence was in equipoise, in which event the "tie goes to free expression." *Playboy Entertainment Group*, 120 S. Ct. at 1889.

On a related point, the First Circuit disregarded this Court's decision in *Greater New Orleans* when it considered a key factual issue with respect to the effectiveness of the regulations. That factual issue is whether Massachusetts' restrictions on advertising for tobacco products will cause a material reduction in total youth smoking (as the Attorney General contends), or whether such advertising primarily contributes to brand-switching (as plaintiffs contend).

This Court addressed the "brand-switching" issue in *Greater New Orleans*. In the context of advertising for casinos, the Court stated that, "[w]hile it is no doubt fair to assume that more advertising would have some impact on overall demand for [a product], it is also reasonable to assume that much of that advertising would merely channel [consumers] to one [brand] rather than another." 527 U.S. at 189. This Court's statement is consistent with the extensive scientific evidence submitted by the plaintiffs herein, including the only expert testimony in the record. Remarkably, however, the court of appeals refused to accept this Court's authoritative statement about brand-switching, instead doing no more than citing *Greater New Orleans* with a "but see" signal. *See* App. 26a. At the very least, *Greater New Orleans*, together with plaintiffs' evidentiary submissions, should have raised a triable issue under the "effectiveness" requirement.

As a second reason for reversing the decision below, the government failed to demonstrate that it has used the

"least restrictive means" to advance its goal, or, to put the requirement in *Central Hudson* terms, that it has carefully considered obvious, less burdensome alternatives to censorship. *See 44 Liquormart*, 517 U.S. at 506-08 (Stevens, J.); *id.* at 524-26 (Thomas, J., concurring); *id.* at 528-31 (O'Connor, J., concurring). The court of appeals mistakenly failed to require the government to prove why it did not adopt alternative means for reducing youth smoking that would have no impact on speech.

These alternatives include stricter enforcement or enhanced penalties with respect to laws that prohibit sales of tobacco to minors, anti-tobacco campaigns in schools, and – most obviously – the enactment of a law that would forbid the possession and use of tobacco by minors. Indeed, the court acknowledged that "criminalization of underage tobacco use or possession (or stricter enforcement of existing laws, for that matter) might reduce the amount of current tobacco use." App. 32a. In light of that acknowledgement, it is difficult to fathom how the First Circuit could have ruled *ipse dixit* against plaintiffs. As this Court has held, the First Amendment plainly does not permit government to restrict speech in an attempt to indirectly influence conduct, when it has yet to take the step of directly regulating that conduct. *Rubin*, 514 U.S. at 489-91. Because the First Circuit failed to hold the Attorney General to his constitutional burden of proof, its decision upholding the Massachusetts regulations should be reversed.

CONCLUSION

The Massachusetts regulations impose a content-based restriction on speech. Such restrictions are presumptively invalid because they do not fall within any of the limited exceptions to the First Amendment. The court of appeals erred by concluding that government has greater leeway to restrict speech when it seeks to protect children. If the court had applied the appropriate level of First Amendment scrutiny, it could not have ruled in the government's favor. The decision of the court of appeals should be reversed and judgment should be entered in favor of plaintiffs or, at a minimum, the case should be remanded with instructions to apply full First Amendment scrutiny to the restrictions.

Respectfully submitted,

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